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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ——

STATE OF MINNESOTA,
ARTHUR C. ROEMER, Commissioner of Taxation, Income Tax Division, Department of Taxation, State of Minnesota,
GEROME T. CAULFIELD Coordinator, Income Tax Division, Department of Taxation, State of Minnesota,
VAL BJORNSON, Treasurer, State of Minnesota,
ROLLAND F. HATFIELD, Auditor, State of Minnesota,
HOWARD B. CASMEY, Commissioner of Education, State of Minnesota,
RICHARD L. BYE, DAVID C. BRANDON, DANIEL BURTON, B. ROBERT LEWIS, RALPH H. PETERSON, MARY JO RICHARDSON, GEORGE A. ROSSMAN, HENRY E. SCHROEDER AND LOUIS R. SMERLING, as members of the State Board of Education, State of Minnesota,
SAMUEL L. RICHARDSON, Commissioner, Department of Human Rights, State of Minnesota,

Petitioners,

and

LOUIS QUAST, RICHARD G. CONLIN, JOSEPH L. LEWIS AND MANUEL RIVERA, INTERVENORS,

Petitioners,

and

JAMES P. LARKIN, HARRIS DUININCK, BERT VAN'T HULL, ALBERT F. MARTIN, ROBERT GEORGE ZABEL, AND ROBERT ULRICH, INTERVENORS,

Petitioners,

vs.

MINNESOTA CIVIL LIBERTIES UNION,
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
MATTHEW STARK, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
DONALD E. KRAUSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota,
KATHLEEN E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ROLFE E. HAUSER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

CARL LUNDSTROM, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

ELEANOR OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

WILLIAM B. OTTERNESS, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

and

MINNESOTA COORDINATING COMMITTEE FOR PUBLIC EDUCATION;

SCHOOL ADMINISTRATORS OF MINNESOTA;

MINNESOTA EDUCATION ASSOCIATION;

MINNESOTA FEDERATION OF TEACHERS;

MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS;

MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS;

MINNESOTA ELEMENTARY SCHOOL PRINCIPALS ASSOCIATION;

MINNESOTA CONGRESS OF PARENT AND TEACHERS ASSOCIATIONS;

AMERICAN JEWISH CONGRESS;

JEWISH COMMUNITY RELATIONS COUNCIL OF MINNESOTA;

FIRST UNITARIAN SOCIETY OF MINNEAPOLIS;

MINNESOTA CONFERENCE OF SEVENTH DAY ADVENTISTS;

BRUCE A. OLANDER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

VALERIE V. OLANDER, by BRUCE A. OLANDER, as her Guardian ad Litem;

MRS. JANET M. SIGFORD, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD HENKEN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

FRANKLIN G. EMRICK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

TOLLIE J. FLIPPIN, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

MRS. ROBERT ROSE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

EDWARD BOLSTAD, individually and as a representative of the class of all taxpayers of the State of Minnesota;

A. L. GALLOP, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

JAMES J. ROSASCO, individually, and as a representative of the class of all taxpayers of the State of Minnesota;

DAVID W. MEADE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MRS. ARVIS NELSON, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
L. E. WERMAGER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CHARLOTTE CARMAUCHE, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
MARY VAN KIRK, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
WAYNE VAN KIRK individually, and as a representative of the class of all taxpayers of the State of Minnesota;
CALVIN DIDIER, individually, and as a representative of the class of all taxpayers of the State of Minnesota;
SAMUEL L. SCHEINER, individually, and as a representative of the class of all taxpayers of the State of Minnesota,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

QUESTIONS PRESENTED

The Minnesota Supreme Court did not err in holding that the Minnesota Tax Payment-Tax Credit Act violated the Establishment Clause of the First Amendment to the United States Constitution, as required by *Committee for Public Education v. Nyquist,* 413 U.S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973); *Sloan v. Lemon,* 413 U.S. 825, 93 S. Ct. 2982, 37 L. ed. 2d 939 (1973); *Levitt v. Committee for Public Education,* 413 U.S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973); *Hunt v. McNair,* 413 U.S. 734, 93 S. Ct. 2868, 37 L. ed. 2d 923 (1973); *Kosydar v. Wolman,* 353 F. Supp. 744 (S. D. Ohio 1972), certiorari denied, sub nom. *Grit v. Wolman,* 413 U.S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973); and *Franchise Tax Board of Calif-*

ornia v. United Americans for Public Schools, — U.S. —, 95 S. Ct. 166, 43 U.S. Law Week 3224.

STATEMENT OF FACTS

The 1971 Minnesota State Legislature passed Ch. 944, which was signed into law by the Governor June 7, 1971. The Act is in effect for the taxable years beginning after December 31, 1970. The Act is set forth in the Appendix (A.-134, et seq.).

Ch. 944 was passed during the regular session. It allows parents of children attending nonpublic elementary and secondary schools in Minnesota to credit a portion of their educational costs against their State income tax. Cash payments are made to the claimants by the State if the credits exceed the tax due. Ch. 944 is to be found in *Minnesota Statutes* §§290.086 and 290.087, and is hereafter referred to as "The Minnesota Tax Credit-Payment Act" or "the Act".

On August 24, 1971, the Minnesota Civil Liberties Union and Americans United for Separation of Church and State jointly commenced a lawsuit on behalf of themselves and with seven Minnesota taxpayers to declare the Act unconstitutional and to enjoin its operation (A.-1).

On September 14, 1971, a second action was brought to declare Ch. 944 unconstitutional and to enjoin its operation. This second action was brought by Minnesota Coordinating Committee for Public Education, an unincorporated voluntary association of educational groups who support public education and who oppose public financing of religion, religious education and private education (A. 23).

Also plaintiffs in this second action are the School Ad-

ministrators of Minnesota, the Minnesota Education Association, the Minnesota Federation of Teachers (AFL-CIO), the Minnesota Association of Secondary School Principals, the Minnesota Elementary School Principals Association, the Minnesota Congress of Parent and Teachers Associations, the American Jewish Congress, the Jewish Community Relations Council of Minnesota, the First Unitarian Society of Minneapolis, the Minnesota Conference of Seventh Day Adventists, and 17 Minnesota taxpayers (A.-23).

The defendants in the second action were the State of Minnesota, the Commissioner of Taxation, the Commissioner of Education, the State Treasurer and the State Auditor.

Both actions were for a declaratory judgment and injunctive relief alleging that the Act violates Article VIII, §2, Article I, §16, Article IV, §33, Article IX, §1 and Article I, §2 of the Minnesota State Constitution; and alleging violation of the Establishment and Free Exercise Clauses of the First Amendment to the U. S. Constitution as applied to the states through the Fourteenth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U. S. Constitution (A.-1; A.-23).

In an Order filed February 1, 1972, the trial court granted the plaintiffs' motions to consolidate the cases for trial. Subsequently, two groups of parents of children in non-public schools moved the trial court for permission to intervene, and prior to trial the trial court granted their motions to participate as intervenor-defendants.

On February 1, 1972, the trial court denied the State of Minnesota motion to dismiss organizational plaintiffs

for lack of standing in the Minnesota Civil Liberties Union action, denied the State of Minnesota motion to dismiss on the basis that there was lacking a justifiable controversy, denied the State of Minnesota motion to strike paragraph 19 of the Minnesota Civil Liberties Union complaint, and denied the State of Minnesota motion to dismiss the State Commissioner of Education, members of the Minnesota State Board of Education and the Commissioner of the Department of Human Rights.

Also, on February 1, 1972, the trial court denied the State of Minnesota motion to dismiss the organizational plaintiffs for lack of standing in the Minnesota Coordinating Committee for Public Education action, denied the State of Minnesota motion to dismiss this action on the basis that there has lacking a justifiable controversy, denied the State of Minnesota motion to strike paragraphs 2, 3 and 9 of the complaint, striking paragraph 21 which alleges that lobbying activities took place, and taking judicial notice that lobbying activities are done with taxing laws and this law, and denied the State of Minnesota motion to dismiss the Commissioner of Education as a defendant.

Prior to trial, plaintiffs moved the trial court for a temporary injunction restraining the operation of its Act until the main action was determined. The trial court denied plaintiffs' motions for a temporary injunction and the trial of the case was heard by Judge J. Jerome Plunkett from March 1, 1972, through March 8, 1972.

The District Court made its Findings of Fact, Conclusions of Law and Order for Judgment, dated July 6, 1972, and judgment was entered by the Clerk upon said Order for Judgment on July 10, 1972.

Respondents timely moved for a new trial and amended

Findings of Fact and Conclusions of Law which was heard by the District Court on August 30, 1972, and the trial court denied Appellants' said motion by an order dated September 12, 1972.

The Minnesota Supreme Court herd the appeal April 1, 1974, and filed its decision November 26, 1974.

The Act provides for a direct payment or tax credit, not a tax deduction, based upon the following for the years 1971 and 1972:

1. The amount paid by the parent or legal guardian for education costs.

2. The Minnesota Nonpublic School's Restricted Maintenance Cost (maintenance cost less 20%) per pupil in average daily attendance times the percentage of average State Foundation Aid; limited to the number of months a pupil was enrolled in such nonpublic elementary or secondary school during the calendar year.

3. The maximum allowable credit is limited to $50.00 for a kindergarten pupil, $100.00 for an elementary school pupil, and $140.00 for a secondary school pupil (T.-63-79; 81-82; A.-134).

This is not a deduction, but the credit is a dollar for dollar reduction of the tax owed, and if the credit exceeds the tax liability, a payment is paid as a refund to the taxpayer. (Court's finding No. 11; A.-73).

The Department of Taxation has not promulga'ed any regulations to implement the Act (T.-114-116, 163; Court's finding No. 16; A.-13).

The Department of Taxation has made and distributed

three forms and an instruction circular, which are all sent to the nonpublic schools, that is, Form NSRC-1, Form NSRC, Schedule NSC, and Circular NSC. On Form NSRC-1, the school must compute maintenance cost for the schol year, including administration, salaries for instruction, textbooks and other instructional and educational materials, attendance and health services, transportation cost, cost of operation of plant, cost of food services and cost of student activities disbursements; then the school must deduct income from the sale of textbooks and other instructional and educational materials and supplies, receipts from the sale of lunches, student activities receipts up to the amount of the expenditure, receipts for transportation and refunds received or disbursements made; these deductions from maintenance costs for the school year equals the adjusted maintenance cost from which the school must subtract federal monies received; the school must then compute the average daily attendance based upon pupil units which is divided by the average daily attendance; the equivalent maintenance cost per pupil unit in average daily attendance is multiplied by 80 percent, which gives the figure of the restricted maintenance cost per pupil unit in average daily attendance; the restricted maintenance cost per pupil unit in average daily attendance is multiplied by the percentage of average state foundation are paid per pupil unit which gives the maximum allowable credit per pupil for the calendar year (T.-47, 48, 52-59, 66-69, 71-74).

The maximum allowable credit on the tax return is the lower of:

1. The amount actually paid;

2. The restricted maintenance cost formula. or

3. The allowable credit of $50, $100 or $140 dependent on the gade attended (Court's finding No. 26, A.-74-75).

Further, the Act, *M.S.A.* 290.086, Subd. 7 (a)(b)(2)—requires a receipt or receipts for each student filed by an official of the student's nonpublic school of enrollment reporting the restricted maintenance cost of education per pupil unit in average daily attendance in the school of enrollment based upon the most recently completed school year. The law does not specify the method and manner of reporting the accounting procedure, nor the accounting practices to be used, unlike the Minnesota public schools which are required by law to report to the Commissioner of Education detailed financial reports and attendance regulated by a two-inch thick accounting manual specifying the particular accounting methods, procedures, practices and forms to be used. The Commissioner of Taxation and his assistant said that Form NSRC-1 must be filed to implement the Act (T.-5-87, 109-118, 223-225).

Gerome Caulfield of the Department of Taxation testified that he was assigned the task of coordinating the implementation of the Act for the Department including designing the instructions to taxpayers and the various forms used by taxpayers and the nonpublic schools; he explained the operation of the Act and the use and function of the various forms (T.-47-74).

The nonpublic school gives the Form NSRC to the claimants to be attached to claimants' income tax returns (Court's finding No. 19; A-74).

The Schedule NSC is a summary form essentially for the

assistance of the claimant and the convenience of the Department of Taxation, the form is not specifically required by the terms of the Act nor by the Department of Taxation (T.-47-74; Court's finding No. 23; A.-74).

During the calendar year 1973 and each year thereafter the amount allowed as a tax credit per pupil unit shall be the result of the following calculations: (a) Divide the average Minnesota public elementary and secondary school foundation aid payment per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, as determined and published by the State Department of Education based upon the results of final adjustments made by the state aids, statistics and research section of the division of administration of said state department as of October of each year, by the same average foundation aid from the previous school year; (b) multiply the result of the above calculation by the tax credit per pupil unit allowed in the first paragraph of this subdivision for the preceding calendar year; (c) the result of the calculations (a) and (b) above is the maximum tax credit per pupil unit to be allowed herein for the taxable years after calendar year 1972 (Court's findings Nos. 26-28; A.-74-76).

The Act provides that in no event shall any tax credit per pupil unit allowed per student under this section, when related to the individual nonpublic school restricted maintenance cost per pupil unit in average daily attendance of the school year completed during the same calendar year for which the tax credit is claimed, exceed the percent of the average state foundation aid per pupil unit in average daily attendance for Minnesota public elementary and secondary schools in relation to the average state and local

maintenance cost per pupil unit in average daily attendance in said public schools for the school year completed during the same calendar year for which the tax credit is claimed. Said average state foundation aids and state and local maintenance costs shall be as determined and published by the state department of education based upon results of final adjustments made by the state aids, statistics and research section of the division of administration of said state department as of October 1 of each year (Court's findings Nos. 29-37. A.-76-77).

"Education cost" is defined in the act to mean and include books and other instructional materials and equipment purchased through the nonpublic school of enrollment and used in nonpublic schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship (Court's findings No. 31; A.-76; T.-85).

If textbooks are furnished by the school, however, they become a part of the school's maintenance costs, and such textbooks included in maintenance costs could include textbooks which are used in the teaching of religious tenets, doctrines or worship (Court's finding No. 31; A.-76; T.-84-87).

For the claimant to be entitled to the credit, the child or ward must attend a "nonpublic school", which is defined as any elementary or secondary school, other than a public school, situated in this state, wherein a resident of this state may fulfill the state's compulsory attendance laws, is not operated for profit, and adheres to the provisions

of the Civil Rights Act of 1964 (Court's finding No. 15: A.-73).

No taxpayer shall claim any deduction for tuition or cost of transportation of any dependent pursuant to *Minnesota Statutes* 1969, Section 390.09, Subd. 22, if he claims a tax credit for such dependent or if anyone else claimed an income tax credit under the Act (T.-918-919; the Court's findings Nos. 13, 14; A.-73).

Eighty-five percent of Minnesota nonpublic schools are Catholic, 13 percent are Lutheran and 3 percent are other denominational or private schools. There are 260 Catholic parochial schools in Minnesota and there are 182 Catholic parochial schools in St. Paul-Minneapolis. There are 1,394 teachers in the Catholic parochial school system (T.-730; Exh. 81).

REASONS FOR DENYING THE WRIT

The Minnesota Supreme Court decision is in firm and complete accord with previous decisions of this Court.

The Minnesota Supreme Court correctly held that this Court's recent rulings control all of the issues presented by the Minnesota Tax Credit Payment Act, which rulings clearly eliminate the tax credit approach to public funding of nonpublic schools.

The Minnesota Supreme Court based its rulings on four decisions of this Court on June 25, 1973, and this Court's denial of certiorari in a quite similar Ohio tax credit case, and summary affirmance of a California Federal Court decision invalidating a quite similar California tax credit plan (A.-119, 126). A brief description of these cases is as follows:

1. *Committee for Public Education and Religious Liberty, et al. v. Nyquist, et al.*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. ed. 2d 948 (1973), invalidating New York financial aid programs for nonpublic elementary and secondary schools:

a) direct money grants to nonpublic schools serving high concentrations of pupils from low income families for maintenance and repair;

b) tuition reimbursement plan for parents of nonpublic school children with taxable income less than $5,000;

c) tax credits to parents of nonpublic school children failing to qualify for tuition reimbursement.

2. *Sloan, et al. v. Lemmon, et al.*, 413 U.S. 825, 93 S. Ct. 2982, 37 L. ed. 2d 939 (1973), invalidating a Pennsylvania tuition grant, parent reimbursement act for parents of children attending nonpublic elementary and secondary schools.

3. *Levitt, et al. v. Committee for Public Education and Religious Liberty, et al.*, 413 U.S. 472, 93 S. Ct. 2814, 37 L. ed. 2d 736 (1973), invalidating New York legislation appropriating 28 million dollars to reimburse nonpublic elementary and secondary schools for expenses of services, including tests, examinations, enrollment records, health record, personnel records and various other reporting to the State.

4. *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2858, 37 L. ed. 923 (1973), invalidating a South Carolina scheme for aiding colleges by issuance of revenue bonds for proj-

ects, whereby colleges convey projects to state authority, which lease back and reconvey on payment of bonds.

5. *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972), certiorari denied, sub nom. *Grit v. Wolman*, 413 U.S. 901, 93 S. Ct. 3062, 37 L. ed. 2d 1021 (1973), invalidating Ohio's tax credits to parents with children in nonpublic elementary and secondary schools.

6. *Franchise Tax Board of California v. United Americans for Public Schools*, — U.S. —, 95 S. Ct. 166, 43 U.S. Law Week 3224, invalidating California's tax credits to parents with children in nonpublic elementary and secondary schools.

The Minnesota Supreme Court opinion below examined extensively the six-judge majority opinion of Mr. Justice Powell, in *Nyquist, supra* (A.-119-127). Petitioners' central argument here is that the Minnesota Supreme Court opinion below departed from this Court's ruling in *Nyquist* and related cases and fashioned itself a so-called "any effects test." There is no factual basis for this assertion.

The Minnesota Supreme Court firmly embraced this Court's three-part standard for analyzing questions arising under the Establishment Clause of the First Amendment A.-117, 118). The Minnesota Supreme Court noted that in each of the cases before this Court, the Court had little difficulty in passing over the issue of secular purpose, and coming to grips with "the crucial question" of the primary effect test of whether its (legislative program) principal or primary effect advances religion. *Tilton v. Richardson*, 403 U.S. 672, 679, 91 S. Ct. 2091, 29 L. ed. 2d 790, 799 (1971) (A.-118).

The Minnesota Supreme Court noted the Minnesota trial

court found the Minnesota Act to have a valid secular purpose and stated its accord with that holding (A.-118). The Minnesota Supreme Court noted that the Minnesota trial court found the statute survived entanglement challenges, but in disposing of the Minnesota Act on primary effect grounds, stated that it need not consider the entanglement issue (A.-118, 119, 127).

The Minnesota Supreme Court firmly based its holdings upon this Court's majority decision in *Nyquist* and related cases, that the primary effect of the Minnesota Act is to aid religion. The Minnesota Supreme Court did not fashion a new test in place of this Court's primary effect test, as mistakenly advanced by the Petitioners.

The Petitioners would have this Court believe that it adopted a so-called "any effects test," whereas, in truth, the Minnesota Supreme Court majority decision, and to a greater extent the concurring decision merely expressed some understanding with the views of Mr. Justice White's dissent, while adhering to this Court's majority in *Nyquist* and related cases.

A full quote of the Minnesota Supreme Court which underscores this fact is as follows:

> The dissenting opinions expressed some dismay at the majority's aparent attempt to distinguish the Walz decision on the basis of historical precedent of granting tax-exempt status to religious and charitable institutions. However, Mr. Justice White most clearly recognized the real departure from recent precedent when he stated: "* * * But the test is one of 'primary' effect not *any* effect." 413 U.S. 813, 823, 93 S. Ct. 2993, 2998, 37 L. ed. 2d 982, 987 (A.-123).

By stating its view that *Nyquist* is an "any effects test" and that it has chartered a new course, giving clear prefer-

ence to the Establishment Clause over the Freedom of Exercise Clauses of the First Amendment, the Minnesota Supreme Court has not substituted a new test for this Court's majority ruling on primary effect in *Nyquist* (A.-126-127). The Minnesota Supreme Court clearly stated that they have "reached the disposition of this issue *on the basis of the primary effect test as it now exists . . .*".

The Minnesota Supreme Court adopted the majority ruling in *Nyquist*, analyzed it correctly in its extensive analysis (A.123-127), and applied it in this case.

The Minnesota Supreme Court correctly found that the encompassing language of *Nyquist* clearly disposed of all the arguments raised by the Petitioners, which sought to distinguish the Minnesota case from the holding in *Nyquist* (A.-126).

The Minnesota plan, like *Nyquist*, involves grants which are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them. The Establishment Clause is violated whether or not the actual dollars given eventually find their way into sectarian institutions; whether the grant is labeled a reimbursement, a reward or subsidy, its substantive impact is still the same. *Nyquist, supra,* 413 U.S. at 786, 93 S. Ct. at 2972.

Petitioners attempted to distinguish the Minnesota Act by pointing out that the Act provided a formula whereby maintenance costs were determined and then reduced by 20%, the remaining 80% was termed a restricted maintenance cost, which fit into the credit payment formula (T.-62, Ct. Finding 37, A.-77). Petitioners argue that the reduction of the maintenance cost to 20% insured that no aid would apply to any sectarian portion of nonpublic education.

This Court rejected two provisions which had similar statistical formulae. First, the Court in *Nyquist, supra,* rejected the maintenance and repair provision notwithstanding that the legislature had provided a 50% limitation:

> Quite apart from the language of the statute, our case is made clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. * * * Our cases, however, have long since foreclosed the notion that mere statistical assurance will suffice to said between the Scylla & Charybdis of "effect" and "entanglement". *Nyquist, supra,* 413 U.S. at 778, 789, 93 S. Ct. at 2968, 2973.

Further, the Minnesota Supreme Court noted that Minnesota's Tax Credit legislation was "quite similar" to that of Ohio and "similar' 'to that of California (A.-126).

The *Kosydar* tax credit statute is almost identical to the Minnesota tax credit plan. There is a statutory maximum, as there is in our case; it is a dollar-for-dollar rebate, as in our case; there is a provision for payment from the "tax refund rotary fund" where the total amount of credit exceeds the total state income tax liability, as in our case, with the only difference that Kosydar is limited to the total amount of taxes in all categories paid to the state—the practical effect is the same.

Further, the Ohio act covers broader categories of beneficiaries, other than parents, than the Minnesota Act. As shown in *Nyquist, supra,* and *Levitt, supra,* the more narrow the class, the greater the constitutional infirmity.

Also, the *Kosydar* tax credit statute attempted unsuccessfully to avoid entanglement problems and to attempt insulating sectarian education from aid by limiting the

increase to 25% of the maximum credit for the preceding school year and limting to credit to a taxpayer to 50% of the state-wide average expenditure from all sources for current expenses per public elementary and secondary school pupils for the year ending in the taxable year. This is similar to the Petitioners claim here that the 80-20% formula insulates sectarian activities from aid.

CONCLUSION

The Minnesota Supreme Court reached the disposition of this on the basis of the primary effect test as it now exists. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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